

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**



ORIGINAL  
WITH PROOF  
OF SERVICE

74-2374

---

UNITED STATES COURT OF APPEALS

*for the*

**SECOND CIRCUIT**

---

PIETRO C. RUBINO, for himself and all other persons similarly  
situated, and PHILIP J. ZICHELLO,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff Intervenor-Appellant,

-against-

JOHN J. GHEZZI, individually and in his capacity as Acting  
Secretary of State of the State of New York;  
HERMAN KATZ, individually and in his capacity as City Clerk  
of the City of New York;  
IVAN E. IRIZARRY, individually and in his capacity as Finance  
Administrator of the City of New York; and  
ALICE SACHS, ELRICH A. EASTMAN, HERBERT J. FEUER,  
CHARLES A. AVARELLO, JAMES F. BASS, ELIZABETH A.  
CASSIDY, ANTHONY SADOWSKI, JOSEPH J. PREVITE,  
STANLEY C. KOCHMAN and SALVATORE SCLAFINI, all  
individually and in their capacities as the members of the  
Board of Elections of the City of New York,

Defendants-Respondents.

---

BRIEF OF NEW YORK CITY FAMILY COURT  
JUDGES' ASSOCIATION AS AMICUS CURIAE

---

DIKMAN & BOTTER  
Attorneys for New York City  
Family Court Judges' Assn.  
160-16 Jamaica Avenue  
Jamaica, New York 11432  
(212) REpublic 9-4830



(4431)

## INDEX

	<u>Page</u>
Statement	1
Facts	2
Issue Presented	2
Argument	3
Conclusion	7

## TABLE OF CASES

Ali v. Division of State Athletic Commission, 316 F.Supp. 1246 (S.D.N.Y., 1970)	7
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	4
Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974)	3
Heiner v. Donnan, 285 U.S. 312 (1932)	4
Mancuso v. Taft, 476 F.(2d) 187 (1st Cir. 1973)	3
Murgia v. Commonwealth of Mass. Bd. of Retirement, 376 F.Supp. 753 (D. Mass. 1974)	6
Police Department of Chicago v. Mosby, 408 U.S. 92 (1972)	3
Reed v. Reed, 404 U.S. 71 (1971)	7
Vlandis v. Kline, 412 U.S. 441 (1973)	5
Weiss v. Walsh, 324 F.Supp. 75 (S.D.N.Y. 1971), aff'd. 461 F.(2d) 846	7



STATUTES

	<u>Page</u>
New York State Constitution:	
Article 6, Section 15	2
Article 6, Section 22	6
Article 6, Section 25	5, 6
23 New York State Judiciary Law	2

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

-----X  
PIETRO C. RUBINO, for himself and all  
other persons similarly situated, and  
PHILIP J. ZICHELO,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff Intervenor-Appellant,

-against-

JOHN J. GHEZZI, individually and in his  
capacity as Acting Secretary of State of  
the State of New York;

HERMAN KATZ, individually and in his  
capacity as City Clerk of the City of  
New York;

IVAN E. IRIZARRY, individually and in  
his capacity as Finance Administrator  
of the City of New York; and

ALICE SACHS, ELRICH A. EASTMAN,  
HERBERT J. FEUER, CHARLES A. AVARELLO,

JAMES F. BASS, ELIZABETH A. CASSIDY,

ANTHONY SADOWSKI, JOSEPH J. PREVITE,

STANLEY C. KOCHMAN and SALVATORE

SCLAFINI, all individually and in  
their capacities as the members of  
the Board of Elections of the City  
of New York,

Defendants-Respondents.

-----X  
STATEMENT

This brief is submitted on behalf of the  
New York City Family Court Judges' Association as  
*amicus curiae* in the above entitled action.



FACTS

The facts are undisputed. Plaintiff-Appellant Zichello was elected to a ten year term as Judge of the Civil Court, New York County on November 4, 1969. He was born on November 1, 1904 and attained age seventy on November 1, 1974. Under the challenged State statute and constitutional provision (Art. 6 §15 N.Y.S. Constitution; §23 N.Y.S. Judiciary Law) he must retire at the end of the calendar year in which he reaches his seventieth birthday.


The court below, Griesa, D.J., declined to convene a three judge court to consider the constitutionality of the aforementioned statutory provisions and dismissed the action. The instant appeal stems from such order.

ISSUE PRESENTED

May the State of New York constitutionally mandate the retirement of a judge simply by virtue of his having attained age seventy?\*

---

\* This appeal also presents issues related to the abridgement of rights of plaintiff Rubino and other members of his class (i.e. Zichello supporters and voters over seventy years of age). These issues go beyond the scope of this brief which is limited to the above stated issue.



ARGUMENT

The challenged statutory provisions, in mandating retirement at age seventy, without exception, deprive Plaintiff-Appellant Zichello and other judges similarly situated, whether elected or appointed, of the opportunity to complete their terms in office.

The right to hold public office is guaranteed by the First Amendment (*Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974); *Mancuso v. Taft*, 476 F.(2d) 187 (1st Cir. 1973)).

Unless there is a compelling contravening public interest, the rights of an individual to complete his term in office, without regard to his age alone should not be abridged. *Police Dept. of Chicago v. Mosby*, 408 U.S. 92 (1972).

In the court below, no sufficient reasons were asserted by the Respondents or the court below to justify the intrusion upon the rights of Appellant Zichello and other judges arriving at the age of seventy.

The effect of the mandatory retirement provision is to create an irrebuttable presumption that a judge, upon attaining age seventy, is no



longer capable of fulfilling his responsibilities on the bench.

Statutes creating irrebuttable presumptions have long been held in disfavor by the courts as being potentially violative of the Due Process Clause. In *Heiner v. Donnan*, 285 U.S. 312 (1932) the Supreme Court, in invalidating a statute creating an irrebuttable presumption, stated ". . . that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment" (at p. 329).

In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Supreme Court recently came to grips with a very similar statutory conclusive presumption. It asserted in essence that pregnant school teachers were not fit to continue their employment as teachers after several months of pregnancy. In condemning the broad sweep of this rule, the court indicated that "The Due Process Clause required a more individualized determination" since the statutory presumption was neither necessarily nor universally true.

So, too, with the arbitrary fixing of age seventy as the end of a judicial career. Indeed, Mr. Justice Rehnquist, in his dissent in *LaFleur*,

clearly perceived the application of the majority opinion there to the instant situation when he stated that ". . . the court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes . . ."

While it is clearly more convenient for the State to sweep all seventy year old jurists from the bench without considering their continued capabilities, the court in *Vlandis v. Kline*, 412 U.S. 441 (1973) refused to accept this argument to sustain another conclusive presumption created by statute. It was said that "The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised" (at p. 451).

Reasonable alternatives to the conclusive determination that a septuagenarian can no longer function as a judge are to be found in the New York State Constitution itself. Article 6 §25 provides that certain judges may continue to serve until age seventy-six provided a certification of the judge's continued ability is first secured.



Similarly Article 6 §22 creates a court of the judiciary which has, as one of its primary purposes, the jurisdiction to inquire into the abilities of members of the judiciary. Admittedly, this jurisdiction is punitive in design, but in administration, could provide the individualized determination called for by the courts to further secure the rights of an individual.

To summarily deny an individual the right to continue his chosen employment simply as a result of his having attained a stated age is violative of due process. See *Murgia v. Commonwealth of Mass. Bd. of Retirement*, 376 F. Supp. 753 (D. Mass. 1974).

While the main thrust of Appellant's argument is aimed at invalidating the retirement provisions by reason of the violation of due process, there is some basis to consider the provisions violative of the equal protection clause.

As noted *supra*, certain members of the judiciary can serve beyond age seventy (Art. 6 §25). Plaintiff-Appellant Zichello, as well as all other Civil, Family and Criminal Court Judges, are not accorded that privilege.

Moreover, it appears that no other elected

officials are subject to mandatory retirement.

There seems to be no rational basis for this differentiation, *e. g.* function, activities and duties of legislators and executives as compared to judges. Absent some justification for the discrimination, the offending provision of law must be stricken. *Ali v. Division of State Athletic Commission*, 326 F. Supp. 1246 (S.D.N.Y. 1970); *Reed v. Reed*, 404 U.S. 71 (1971); *Weiss v. Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd* 461 F.(2d) 846.

#### CONCLUSION

The court below erred in summarily dismissing the instant action. Such dismissal should be reversed and this action remanded to the District Court for a hearing before a three judge court.

Respectfully submitted,

DIKMAN & BOTTER, Esqs.  
Attorneys for New York City  
Family Court Judges' Assn.  
*Amicus Curiae*

ALLAN S. BOTTER  
MICHAEL DIKMAN,

of counsel





COPY RECEIVED

DEC 12 1974

GAINSBURG, GOTTlieb, LEVITAN &  
ATTORNEYS FOR

Received <sup>2</sup> 6 copies of the within  
Brief of New York City Family Court Judges'  
this 17 day of Dec, 1974. Association of Amicus Curiae

Sign \_\_\_\_\_  
Shmueling Hattlieb Levitan + Cole  
For: \_\_\_\_\_ Esq(s).

Att'ys for Intervenor Appellant Neubaum

Received <sup>2</sup> 3 copies of the within  
Brief of New York City Family Court Judge, Association  
this 12 day of Dec, 1974. As Amicus Curiae

Sign Ann Gerlock  
For: Stephen B. Gerlock Esq(s).

Att'ys for Plaintiffs Appellants

Received <sup>2</sup> 3 copies of the within  
Brief of New York City Family Court Judges Association  
this 12 day of Dec, 1974. As Amicus Curiae

Sign \_\_\_\_\_  
For: Hon Louis J. Sefkowitz Esq(s).

Att'ys for Defendants Respondent

COPY OF THE WITHIN PAPER

RECEIVED

DEPARTMENT OF LAW

1 1974

NEW YORK CITY OFFICE

ATTORNEY GENERAL

Samuel J. Sefkowitz



